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IN THE

Supreme Court of the United States

No. — 631

October Term, 1957

EMRAY REALTY CORP.,

Appellant,

v.

ROBERT C. WEAVER, as State Rent Administrator,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Jurisdictional Statement

ARNOLD SCHILDHAUS,
Attorney for Appellant,
320 E. 149th Street,
Bronx, New York.

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EMRAY REALTY CORP.,

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ROBERT C. WEAVER, as State Rent Administrator,

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Jurisdictional Statement

Appellant appeals from the judgment of the Court of Appeals of the State of New York rendered on May 16, 1957, refusing leave to appeal and from the dismissal of appellant's appeal as of right on April 4, 1957.

The statement is submitted for the purpose of showing that the Supreme Court of the United States has jurisdiction to hear this appeal and that a substantial question is presented.

Opinions Below

The Court of Appeals has rendered two opinions in this case, officially reported in 307 N. Y. 772 and 309 N. Y. 878; besides making various rulings on motions, officially reported in 309 N. Y. 898; 2 N. Y. 2nd 848; 2 N. Y. 2nd 973.

Jurisdiction

(i) This action was brought in the Supreme Court for the State of New York pursuant to Section 8589 of the Unconsolidated Laws of the State of New York (McKinney). Jurisdiction in causes of this nature is conferred upon the Supreme Court, County of New York pursuant to the above mentioned section.

(ii) The date of the judgment of the Court of Appeals, here sought to be reviewed, is May 16, 1957, on which date said Court filed its journal entry refusing and denying appellant's motion for leave to appeal; having previously on April 4, 1957 dismissed appellant's appeal as of right. Appellant filed its notice of appeal with this Court on July 3, 1957.

(iii) The statutory provision believed to confer jurisdiction of the appeal upon this Court is Section 1257 of Title 28 of the United States Code.

(iv) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to hear this case are *Fiske* v. *State of Kansas*, 274 U. S. 380 (1927); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); *Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Munn* v. *Illinois*, 94 U. S. 113 (1876).

(v) This appeal draws in question, the validity of c:755 of the Laws of 1957 of the State of New York and its predecessors, as applied in this case by the Court of Appeals. Such statute is an Emergency Housing Rent Control Law passed because "a serious public emergency continues to exist in the housing of a considerable number of persons in the State of New York, which emergency was created by war".

Questions Presented by the Appeal

The following questions are presented by this appeal:

1. Whether or not the emergency housing rent control law passed as a war emergency measure by the Federal Government, and almost every state in the Union, still is a war emergency measure alone in the State of New York.

2. Whether or not the State of New York may, because of this emergency, take the property of the appellant.

3. Whether or not the State of New York may create a new class of serfs, bound to their buildings, who may not withdraw their building from the rental market, may not even abandon their buildings, but are chained to the building, and who, if they try to walk away from such buildings are imprisoned.

4. Whether or not the State of New York can compel an owner or an individual, to operate a property at a substantial loss, deny to him a profit, compel, by penal sanctions, the operation of the property at a substantial loss to the owner.

5. Whether or not the State of New York may enforce a law for the benefit of a preponderant voting majority, as against a small class with little voting power.

Statement of the Case

1. The Facts

Emray Realty Corp., the appellant herein, is the owner of a Harlem tenement containing 18 apartments of seven and eight rooms each. It became owner; by a deed in lieu of foreclosure. The building is more than 50 years old.

On January 9, 1953, application was made to a local rent office of the Temporary State Housing Rent Commission to withdraw this house from the rental market. It was denied without even being processed by the Local Rent Administrator; and, in due course, the petition to withdraw this house from the rental market was refused by the Court of Appeals in a case officially reported at 307 N. Y. 772. Appellant's case was predicated on the facts presented, that the property lost more than $10,000 a year; that appellant was subjected to imprisonment; and that the cost of removing these violations were, as the estimates submitted showed, the amount of $40,490.00; greatly in excess of the value of the building. Photographs and the violations placed by the Department of Housing and Buildings of the City of New York were also submitted.

The next phase of this case occurred when the Temporary State Housing Rent Commission, without a hearing, reduced rents in this house in half, because of the failure of the appellant to make repairs. Appellant contended that, since by the terms of their agreement, the tenants

had agreed to make their own repairs, it would be inequitable to reduce rents because of the failure of the tenants to honor their contract. The Supreme Court, New York County, dismissed appellant's petition. This was reversed by the Appellate Division, First Department (officially reported at 284 App. Div. 880) which remitted the whole proceeding back to the Commission. In the course of its opinion, the Court stated, "In 1951, the Rent Administrator in connection with an earlier decision, ordered that the burden of certain maintenance and repairs was to fall on the tenants, and the landlord now alleges, that some of the present violations are chargeable to the tenants failure to meet this burden. We find in the record, no denial by the Administrator that such prior order of 1951 was made and is outstanding."

The next phase was that the Rent Administrator made a new order transferring the obligation of making repairs from the tenants to the landlord and when landlord did not make the repairs reduced the rents by 40%. This went to the Court of Appeals which reversed the two orders and remitted to the Temporary State Rent Commission, to hold a hearing why this house should not be withdrawn from the rental market.

In the record before the Court of Appeals was the first of many convictions of the attorney for the appellant, who neither owns stock nor is an officer of the owning corporation, for violation of the Multiple Dwelling Law, in which he was given 30 days in the Workhouse, by a magistrate without jurisdiction. After serving 5 days, the attorney was admitted to bail and a writ of habeas corpus sustained.

Also, in the record was the fact that no rent was collected and the landlord required to operate the building. Rent did not have to be paid to the landlord because of Section 1446a of the Civil Practice Act of the State of New York, that provides that if there are violations against a property, a landlord may not collect rents even though the violations were created by the tenants and by the terms of their contract the tenants were obliged to remove these violations. Despite the fact that no rent was collected, appellant was required to operate the building or go to prison. This was because of Section 2040 of the Penal Law of the State of New York which provided six months imprisonment or two year probation for failure to furnish services to a tenant.

The hearing held by the State Rent Commission that followed was a kangaroo court. Witnesses for appellant were threatened and refused to appear. Contractors were warned that if they testified, they would be driven out of business. The hearing officer was an inquisitor in a court of inquisition. There was only testimony by appellant; there was no testimony by anyone to contradict a statement of appellant or any testimony by a tenant or anyone else for the tenant's case. The application to withdraw was denied; and still another order transferring the obligation of making repairs from the tenants to the landlord was made.

The decision was made in view of proof that the property lost $30,000 in its yearly operation: was in such a deplorable physicial state that it should be closed up: that the tenants did not pay rent—one tenant had not paid

rent for 15 months despite innumerable court orders requiring her eviction, had, on being evicted moved back, and 12 months after such illegal entry, was still in the building because of the refusal of some minor officials to enforce the law: that the attorney for the appellant had been held as hostage to continue the operation of this building: that he has spent 50 days in prison, and has been sentenced to 60 days, which is on appeal, and faces in the near future, 4 years in prison. This attorney was reported to the Bar Association for possible disciplinary action, reported to the United States Treasury Department as a possible tax evader: reported to the District Attorney as a possible perjurer. All of these have found no merit in such reports.

Again, it went to the courts. The Supreme Court dismissed the petition and the Appellate Division, First Department unanimously affirmed, without opinion, and surprisingly, the Court of Appeals dismissed the appeal as of right and refused leave to appeal.

Back of such refusal is the tremendous adverse publicity received by appellant and its attorney. Both were unskilled in public relations, and the cause was unpopular. The prominence given the attorney and the case was out of proportion to their importance.

Moreover the New York State Rent Regulations provide that if there are violations, a landlord is not entitled to a return (Section 33).

2. How the Federal Question Is Presented

Throughout these protracted proceedings, appellant insisted that the Emergency Housing Rent Control Law was unconstitutional. Appellant insisted that it could not be compelled to operate a building that lost $30,000 a year; that this was confiscation. Appellant insisted that the law was unconstitutional in not permitting it to withdraw this house from the rental market. That a law which held a man as hostage and made him a serf attached to a building was unconstitutional. That a combination of laws that prevented the collection of rents and forced the owner to continue operation of the building and compelled the imprisonment of its attorney was unconstitutional. These and other questions were presented on the appeal.

3. The Federal Question is Substantial

The various questions raised by this appeal have been recurrently before this Court. They can be divided into many questions. The question of rent control has been before this Court in *Block* v. *Hirsch*, 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 179; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393; *Bowles* v. *Willingham*, 321 U. S. 503.

All of these stand for the proposition that emergency rent law may be passed, but that they must be temporary and must provide for reasonable compensation (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 at page 416, Mr. Justice Holmes), and that a "taking" could not be enacted nor could an owner be compelled to offer any accommodations for rents (*Bowles* v. *Willingham*, 321 U. S. 503).

Appellant states that a State may provide that certain minimum health and safety measures be complied with, before a landlord may offer a house in the rental market. It also states that if the landlord finds it unprofitable to meet these standards, he should not be compelled to operate a property against his wishes.

This Court has, on many occasions, considered the question raised on this appeal of confiscation: *Munn* v. *Illinois*, 94 U. S. 113; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; *Tyson and Bro.* v. *Banton*, 273 U. S. 418, 431; *St. Joseph Stock Yards* v. *U. S.*, 298 U. S. 38; *Smyth* v. *Ames*, 169 U. S. 460; *Minnesota Rate Cases*, 230 U. S. 352; *Cooley, Constitutional Limitations*, 8th Edition, p. 758; *Bluefield Co.* v. *Public Service Commission*, 262 U. S. 679, 690; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19 at pp. 48 to 50; *Smith* v. *Illinois Bell Telephone Co.*, 278 U. S. 581, 591.

This Court has also on many occasions considered the question of serfdom that is raised by this case. The owner and its attorney want one thing above all others,—to be unchained from this building; for the right to walk away from this building: for the right to withdraw this house from the rental market. In *Clyatt* v. *U. S.*, 197 U. S. 207 and other cases, this problem has been many times examined.

Moreover, this is not an isolated case. There are 53,208 old law tenements in New York City (buildings at least 56 years old: there are 22,116 buildings between 45 and 56 years old). Each of these, because of rent control, skyrocketing prices (inflation), and the fact that if there is a

violation a building can be compelled to be operated at a loss, is in the same position as appellant.

The emergency in housing no longer exists. Since 1950, the population of the City of New York has decreased 7% (U. S. Census, Special Report on New York City): More than 472,000 new apartments have been erected, an increase of almost 23%, yet the emergency persists. Due to the fact that rents are frozen at 15% above the depression level of 1943, occupancy by an individual of many apartments is common. Moreover, in 1943, rent took 24% of a wage earner's income. Today in New York City, it takes 11% as against a national average of 19%.

4. The Appellate Jurisdiction of the Court Is Properly Evoked

The applicable portion of Section 1257 of the Judicial Code, 28 U. S. C. S. 1257 provides as follows:

> "Final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed as follows: • • • (2) by appeal, where is drawn in question, the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. • • •"

Appellant contends that the New York State Emergency Housing Rent Control Law passed as a war emergency measure is unconstitutional. This law is founded on a legislative declaration of an emergency—which emergency the appellant denies—is being enforced 11 years after the

war. This asserted emergency is itself perpetuated by the rent control legislation. Appellant asserts that the law and the regulations issued by the State Rent Administrator with the force of law, which require an owner to operate a property at a loss, refuse to an owner the right to withdraw his property from the rental market, creates serfs bound to the building they own, and to the tenants who occupy it (an inverse historical relationship), that confiscates the property of an owner: that with other laws sends anyone it can lay its hands on to prison for refusal to operate a building: that in connection with other laws does not allow an owner to collect rents, yet compels the operation of the building, that such a law is unconstitutional. At best, the law as applied in this case is unconstitutional (*Fiske* v. *State of Kansas*, 274 U. S. 380; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282).

ARNOLD SCHILDHAUS,
Attorney for Appellant.

APPENDIX

Order of Affirmance of Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of February, 1957.

Present:

HON. CHARLES D. BREITEL, *Justice Presiding,*
" BENJAMIN J. RABIN,
" MARTIN M. FRANK,
" FRANCES L. VALENTE,
Justices.

10716

In the Matter of the Application

of

EMRAY REALTY CORP.,

Petr.-Aplt.,

for an order under Article 78 of the Civil Practice Act,

against

ROBERT C. WEAVER, State Rent Administrator,

Respt.

An appeal having been taken to this Court by the petitioner-appellant from an order of the Supreme Court, New York County entered on the 18th day of July, 1956, denying petitioner's application for certificates of eviction

for a Harlem tenement which petitioner wished to withdraw from the rental market, and said appeal having been argued by Mr. Arnold Schildhaus of counsel for the appellant, and by Mr. Edward V. Alfieri of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same hereby is affirmed with $20 costs and disbursements to the respondent.

Enter:

JAMES A. CLYNES
Deputy Clerk

APPELLATE DIVISION OF THE SUPREME COURT,
FIRST JUDICIAL DEPARTMENT,
Clerk's Office, County of New York.

I, VINCENT A. MASSI, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above entitled action or proceeding, and entered in my office on the 5th day of February 1957.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 25th day of November 1957.

VINCENT A. MASSI
Clerk

(SEAL)

Order of Court of Appeals Granting Motion and Dismissing Appeal

At a Court of Appeals for the State of New York, held at Court of Appeals Halls in the City of Albany on the fourth day of April A. D. 1957.

Present:

HON. ALBERT CONWAY, *Presiding Chief Judge.*

Mo. No. 116

In the Matter of the Application of

EMRAY REALTY CORP.,

Petitioner-Appellant,

for an order under Article 78 of the Civil Practice Act,

against

ROBERT C. WEAVER, as State Rent Administrator,

Respondent,

and

THOMAS V. SINCLAIR, Local Rent Administrator,

Respondent.

A motion having heretofore been made upon the part of the respondent Robert C. Weaver, as State Rent Administrator, to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and appeal dismissed, with costs and ten dollars costs of motion, upon the ground that no substantial constitutional question is presented.

/s/ GEARON KIMBALL
Deputy Clerk

Opinion of Court of Appeals

(Emray Realty Corp. v. McGoldrick—307 NY 772)

Appeal dismissed, with costs, for the reasons stated in the following memorandum: While a constitutional right to withdraw real property from the rental market exists in an appropriate case, this appeal must be dismissed upon the ground that the asserted constitutional questions are not directly and necessarily involved in the decision appealed from. Kaney v. N. Y. State Civil Service Commission, 298 NY 570, 81 N. E. 2d 105; Haydorn v. Carroll, 225 NY 84, 121 N. E. 463.

All concur.

Opinion of Court of Appeals

(Emray Realty Corp. v. Charles Abrams—309 NY 888)

PER CURIAM

The record before us is so confused and so incomplete as to prevent a determination as to whether or not the State Rent Administrator's application of the provisions of the rent laws here involved is confiscatory and thereby denied petitioner due process of law. This is an unusual case and in the interest of justice, it seems to us that the matter should be remitted to the Rent Administrator with directions to conduct a full hearing (and keep a complete record thereof), at which petitioner may call witnesses and present evidence concerning the subject premises, their cost and value, the income derived and the rents due and/or collected therefrom, the expenses of operation and maintenance, the building violations or other violations filed or recorded against the premises, the repairs made in or about them, the reasonable cost of rectifying violations, and also these and any other specific evidence should be admitted bearing upon the question whether petitioner should be permitted to withdraw the premises from the rental market.

The order of the Appellate Division and that of Special Term should be reversed and the matter remitted to the State Rent Administrator to proceed in accordance with the Per Curiam opinion herein.

All concur except Dye, J., taking no part.

Note as to Opinions

The issues before the Court of Appeals in this case were the right of the State Rent Commission to transfer the obligation of making repairs from the tenants to the landlord—the tenants had agreed in consideration of a reduced rent to do their own repairs—; and a reduction of rent by the Commission of all the apartments in this house based on landlord's failure to make the repairs after the order of the Commission transferring this obligation to make repairs from the tenants to the landlord. The Court of Appeals reversed both orders; and at the same time reversed themselves as to the first of the printed opinions, the right to withdraw this house from the rental market by ordering a hearing. This was not an issue before the Court. In the second case, landlord went up as a matter of right, after a unanimous affirmance by the Appellate Division, First Department, a motion to dismiss the appeal was denied by the Court. In the case before this Court for review, landlord again went up as a matter of right, and surprisingly, the Court dismissed the appeal. The explanation is that the Court of Appeals decides which case they will hear by a majority vote, and the membership of the Court had changed between the two cases.

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ROBERT C. WEAVER, as State Rent Administrator,

Respondent-Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY AFFIDAVIT OF ARNOLD SCHILDHAUS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ARNOLD SCHILDHAUS,
Attorney for Petitioner-Appellant,
320 East 149th Street,
New York, N. Y.

IN THE

Supreme Court of the United States

October Term, 1957

No. 631

EMRAY REALTY CORP.,

Petitioner-Appellant,

v.

ROBERT C. WEAVER, as State Rent Administrator,

Respondent-Appellee.

Reply Affidavit of Arnold Schildhaus in Opposition to Motion to Dismiss or Affirm

ARNOLD SCHILDHAUS, being duly sworn, deposes and says:

(1) That he is the attorney for the petitioner-appellant, and admitted to practice in this Court.

(2) Replying in seriatim to misstatement of facts, inaccuracies, omissions, errors, false inferences and conclusions contained in a brief accompanying motion to dismiss—the motion has never been received by deponent—that he begs the permissions of the Court to list these discrepancies.

(3) The appeal was made from the order of May 16, 1957 and not the order of April 4, 1957 because deponent believed that in order to ask this Court to review a proceeding in a state court, all remedies in the state courts

must be exhausted. The order of April 4, 1957 dismissed an appeal as of right taken pursuant to section 588 (1) of the Civil Practice Act which allows an appeal as of right where there is directly involved the construction of the constitution of the state or of the United States. The Court of Appeals dismissed the appeal upon the ground that no substantial constitutional question was presented. Petitioner-appellant in order to exhaust his remedies made a motion pursuant to section 589 of the Civil Practice Act for leave to appeal or in the alternative to amend the remittitur to state that a constitutional question was necessarily involved. This motion was denied by the Court of Appeals on May 16, 1957. A notice of appeal to the Supreme Court of the United States was filed with the clerk of the County of New York where the record was possessed, and a copy served on respondent-appellee.

Heretofore, respondent-appellee had made a motion to dismiss this appeal; that motion was denied in the Supreme Court of the State of New York, County of New York, by Mr. Justice Jacob Markowitz, on September 10, 1957. A certified copy of such order is attached hereto.

(4) Chapter 755 of the Laws of 1957 of the State of New York is entitled "The Emergency Housing Rent Control Law". It provides in section 10 (4): "Nothing in this act shall be construed to require any person to offer housing accommodations for rent, but housing accommodations already on the rental market may be withdrawn only after prior written approval of the state rent commission, if such withdrawal requires that a tenant be evicted from such accommodations." Attached to this reply brief is the brief of petitioner-appellant to the Court of Appeals in the first *Emray* case (307 N. Y. 772) decided in July 1954. It was demonstrated in that brief that the language of the New York statute was an exact copy of the language of Section 4 (d) of the Emergency Price Control Act of 1942 (56 Stat.

28) and regulations issued pursuant thereto listed in the accompanying brief. This section was repeated in the Housing and Rent Acts of 1947 and that of 1949 (62 Stat. 99, Section 302; 63 Stat. 29, section 302).

This Court and the various courts of appeal in the circuits have considered and passed upon this clause. This Court in *Bowles* v. *Willingham* (321 U. S. 503), said that this clause was essential to the constitutional validity of the Price Control Act. The Circuit Court of Appeals in *Taylor* v. *Bowles*, 145 Fed. (2d) 833; *Woods* v. *Durr*, 170 Fed. (2d) 976, 176 Fed. (2d) 273; and *Wilson* v. *Brown*, 137 Fed. (2d) 348; had ruled that the Price Administrator and the Housing Expediter must issue certificates of eviction if a landlord states that he wishes to withdraw his house from the rental market. The statement on page 3 that: "the Administrator is charged under the State Rent Act, with the burden of determining whether the landlord in good faith seeks to withdraw his property without any intent to rent or sell" does not appeal anywhere in the statute creating rent control. Nor is it accord with the decisions of federal and state courts—all of the state had rent control, today only the City of New York, a few isolated towns and cities in New York, and a few small towns in Connecticut still have rent control—all of the these courts have stated that a stated wish to withdraw on the part of the landlord is sufficient.

The first *Emray* case here discussed is the leading case in New York on the question of withdrawal from the rental market; the law reviews in commenting on the case have stated that the right to withdraw in New York is "nebulous" (N. Y. U. Law Review, December 1956).

The statement is made in the brief that: "The cases are legion in which the State Rent Administrator has authorized withdrawal by sincere landlords." This is more than a gross exaggeration; in no case where a landlord

wished to close up a building because he was either losing money, or faced criminal prosecution, or because the house in its opinion was unprofitable to repair or any combination of these has withdrawal ever been granted.

(5) The purported refusal of the Administrator—as contained in the Order and Opinion of the Administrator which is part of the certified record submitted to this Court—was based on the failure of petitioner-appellant to supply the books of the corporations that owned this house for audit. It was the position of the Administrator that a profit and loss statement accompanied by bills and checks were not sufficient. The profit and loss statement showed rent collections of $2654.80 and expenses of $33,561.33—a net loss of $30,906.53. Of these expenses $13,917 represented fixed charges. Nowhere were these fixed charges challenged or disputed. The only items challenged were certain items of repairs. These the Rent Administrator sought to blow up and magnify. As the petition points out in detail, each of these disputed items is triply corroborated; most are corroborated by the Administrator by orders acknowledging that the work was completed. But even disregarding these disputed items; the undisputed items show that this building was operated at a huge loss year after year.

The attempt of the Administrator on page 3 of his brief to inject a new issue of good faith, raised here for the first time, is one that he always tries to inject into every appeal. He had forgotten previously in this case. The statement that "this is simply a case in which this landlord has failed where others have succeeded" is new and simply untrue.

(6) The statement on page 3 that "the temper of the appeal is exemplified by the wholly irresponsible charges levelled against the Supreme Court, the Appellate Division and the Court of Appeals of the State of New York", it is most humbly submitted that no charges were levelled

against any of these great courts. The statement is true that this house and its attorney have received tremendous adverse publicity in every newspaper in New York City except the New York Times, the New York Herald Tribune, and the New York Evening Journal which have presented the facts fairly. Rent Control is very popular with tenants in New York.

(7) On page 4 appears the statement denying threats and intimidation of witnesses. These charges were made before Mrs. Zimmerman, the hearing officer of the Administrator. Contractor after contractor refused to appear to testify as to the cost of removing the violations; and the few that were induced to come refused to stay when they saw Mrs. Rogers, Deputy Commissioner of Housing, and Barney Malone, her assistant. Others stated that they were warned not to testify.

I regret to say this, but many attorneys refused to represent petitioner-appellant or its attorney even for large fees. Most were personal friends and acquaintances of petitioner's attorney who felt that they would incure the enmity of powerful political personages. This was true of only a small percentage of lawyers.

(8) On page 4 is the most serious charge of all against petitioner-appellant—"the appellant has injected numerous references to criminal convictions—Bar Association and Internal Revenue investigations of its attorney of record, Arnold Schildhaus. These were never part of the proceedings before the State Rent Administrator." It takes an awful lot of guts to make a statement like that to the Supreme Court of the United States. The petition in this proceeding which is sought to be reviewed in this Court alleges in paragraphs 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 21, 21, 22, 23, 24, 25, 26, 33, 34 and 35 the criminal convictions and investigations. More than half of the paragraphs in the petition which is included in the certified

record on appeal deals with these convictions of the attorney for the landlord who does not own a share of stock in the owning corporation and who has not been permitted to walk away from this house or resign. Any attempt to resign or walk away is met by a prosecution. As the Jurisdictional Statement alleges on pages 5, 6 and 7; these statements were taken from the petition in the N. Y. Supreme Court.

Incidentally in connection with the report of attorney for the petitioner-appellant to the Treasury Department as the petition states in paragraph 26; the subpoena for the production of the books of the corporation that owns this building were served on him while in the offices of the State Rent Administrator. He had told no one that he was going to go to that office; he went there without an appointment and was detained under one pretext or another until the subpoena was served. The Rent Administrator then denied the request to withdraw primarily because he was not permitted to audit the books of the corporation. It would be unfair to state that petitioner-appellant's attorney had not stated his position that he believed the books were not the best evidence and were self-serving.

(9) On page 4 is omitted the statement that the Appellate Division reversed because petitioner-appellant had not been accorded due process.

(10) The statement on page 5 that: "There, for the first time in these proceedings, landlord raised the question of withdrawal from the rental market" is most untrue. The Court of Appeals is a constitutional court of limited jurisdiction. It cannot consider questions raised there for the first time (N. Y. State Constitution, Article 6, Section 7). The brief of petitioner-appellant to the Court of Appeals was addressed to the inherent unfairness and injustice of the proceedings. The Court of Appeals agreed and besides reversing, to use their words "in the interest of

justice" they ordered a hearing as to whether this house should be withdrawn from the rental market.

(11) Included in the Appendix is the opinion of the Court of Appeals in the first *Emray* case (307 N. Y. 772). The brief in that case is also attached to this affidavit to show that as long ago as 1954, a main contention of petitioner-appellant was that its officers and attorney were being prosecuted criminally.

(12) The statement on page 5 that "the mandate of the Court of Appeals was that the Administrator reprocess this case and, in addition apply the objective standard of Section 59 of the Rent and Eviction Regulations" is untrue. The opinion of the Court of Appeals is printed in the Appendix. It deals with the question of confiscation which is not mentioned in Section 59 of the Regulation. Moreover, all orders were reversed, and a hearing restricted to the question of withdrawal from the rental market which was to be conducted under procedures and topics contained in the opinion. As to Section 59 of the Regulations, the Court of Appeals has stated in *New York University* v. *Temporary State Housing Rent Commission*, 304 N. Y. 131 its opinion of Section 59 on page 149:

> "As to the regulation's requirement that undue hardship, immediate necessity, etc. be shown, the problem is, perhaps a little more difficult. There may be doubt that the commission had power to impose such a regulation, in view of the statutory language, and policy which gives a landlord a right to withdraw the accommodation. To allow the commission to impose further requirements of hardship, necessity, etc. would seem, not only to be inconsistent with the statute itself but to be of doubtful constitutionality, as prohibiting a landlord from turning his own property to a nonrental use."

(13) Page 6 has so many mis-statements of fact, misleading inferences, omissions and errors that no purpose would be served in citing page and verse. Moreover, it is an outrageously unfair statement of the proceedings. Line by line contains omissions, and inferences that are unfair. The first line omits that the hearing was held after attorney for the petitioner brought a mandamus proceeding. Line 2 tries to create an inference; this Court may ask what kind of a house is being sought to be withdrawn from the rental market. This is the description given by the second ranking attorney of the Rent Commission in a brief to the Appellate Division, First Department in 284 A. D. 880 between the same parties involving this house: "In general, this second proceeding was based upon a more comprehensive inspection of the building which had been made by investigators and examiners for one or more municipal agencies concerned with maintenance of tenants' services required by law. As might be expected, the inspection and report was more complete than that conducted my the Local Rent Inspector and disclosed derelictions by the landlord far in excess of those adopted as a basis for the 'first order'.

The appellant has never filed a Protest against the 'second order' and his time to do expired on September 18, 1954.

In the first proceeding, begun by tenants on February 5, 1954, the complaints briefly summarized were that accumulated filth in an abandoned dumbwaiter shaft in the rear yard, and in the public parts of the building proper had caused vermin and rat infestation. Flash fires were of frequent occurrence. Throughout the building in public hallways, the lobby and even in the apartments, plaster had deteriorated and fallen away to such an extent that open holes existed. The seriousness of this condition was magnified by the presence of vermin and rats.

Plaster throughout the building was cracked and flaky. Every public part of the building was in need of paint, which generally had deteriorated to such an extent that it was peeling or had fallen away from the plaster entirely. Plumbing was faulty. Public mail boxes were broken. Windows throughout the building were defective. The roof leaked seriously. Door bells were inoperative and the heating plant was so ineffective that that service was rendered only on a spotty schedule. In a similar vein, almost every phase of the building operation was criticized.

An inspection was made by a Local Rent Inspector, whose report verified the existence of the conditions thus generally described. The building was described as being in 'deplorable and filthy condition.'" On page 12 of that brief the statement is made: "The proof before the Administrator established, almost without opposition, the filthy and deplorable condition of this building."

This is the house that petitioner-appellant is not allowed to withdraw from the rental market.

(14) The other statements on page 6 are not true; but they have been previously discussed. The first two lines on page 7 have been urged for the first time before this Court. There is nothing in the Record to support either. The hopeless conflict is one that the Administrator is trying to create. The issue of good faith is being urged here for the first time. The brief of the Rent Administrator in the Appellate Division mentions good faith only once in a 20 page brief. On page 2, he says: "Thus, there was not even an attempt to establish landlord's good faith by valid objective standards."

(15) It is most humbly suggested to this Court that what is being attempted is to try to create a factual situation where none exists. Just as the issue of good faith is being urged here for the first time for the purpose of confusion; so all other claims disappear and leave these facts. That petitioner-appellant is being compelled to operate a

building which has lost from $10,000 to $30,000. Nowhere in the entire record is there a denial that this building lost substantial sums of money in its yearly operation. Even if we go along with the Administrator and disallow certain items the building lost huge sums in its yearly operation. Nor can all the wind and fury disguise the fact that this is an old and obsolescent building that is a fire trap and should not be occupied. The description by the attorney for the Administrator cannot now be disavowed. Nor can it be denied that rents cannot under the law be collected for most of the apartments. There was an attempt to divorce this proceeding from the jailing of the attorney for the landlord to compel the operation of this house against his and the owners will. The attorney has been held as a hostage to compel the operation of this house; when he attempts to flee he is arrested and compelled to operate the building. The various records of convictions in the Magistrates' Court and the Court of Special Sessions you have before you. No false issues can obscure these facts.

Nor is this an unusual case. There are at least 53,000 others in the same position who are compelled to operate buildings at losses most have been fined, some have been jailed. All have buildings more than 57 years old.

(16) On page 7, it is stated that the decision of the court was predicated on the non-constitutional issue of whether, on the record before him, the State Rent Administrator was arbitrary or capricious. Nothing could be farther from the truth. The order of Mr. Justice Lupiano in the Supreme Court of the State of New York whose order was affirmed by the Appellate Division, First Department; and the appeal dismissed and leave to appeal denied by the Court of Appeals; states the reason for such denial as:

> "Its finding that petitioner allegedly seeking to withdraw the building from the rental market, had failed to meet the requirements therefore laid down in Section 59 of the Rent and Eviction Regulations has

sufficient warrant in the record produced before me both in fact and law."

Petitioner-appellant had not made an application pursuant to Section 59. It had insisted throughout that Section 59 as well as the rest of the rent law was unconstitutional. It had insisted that the emergency if there was one was created by this rent control law.

(17) The statement on page 8 that the Appellate Division after hearing extensive argument, and after searching interrogation of landlord's attorney is untrue. If allowing him ten (10) minutes to argue this case is hearing extensive argument then deponent is in error.

(18) The statement on the bottom of page 8 contains error. The motion was for leave to appeal or to amend a remittitur to state that a constitutional question was present. The stated ground for refusal is unusual and puzzling.

(19) The historical background contains so much error that this Court is most humbly and respectfully referred to the brief submitted in the first *Emray* case to the Court of Appeals. It is humbly submitted that it represents a good research job. The Emergency Housing Rent Control Law itself is a confession by the Legislature that no emergency exists. It removes rent control in those communities where the preponderant voting majority own homes; and retains rent control where the preponderant voting majority are tenants. Even in New York City, in order to placate a large group of voters who are owners of small houses, Section 2 (i) provides for decontrol.

ARNOLD SCHILDHAUS

Sworn to before me this
18 day of December, 1957

P. C. D'ONOFRIO
Notary Public

Office - Supreme Court, U.S.
FILED
DEC 7 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 631

EMRAY REALTY CORP.,

Petitioner-Appellant,

v.

ROBERT C. WEAVER, as State Rent Administrator,

Respondent-Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

NATHAN HELLER,
Attorney for Respondent-Appellee,
280 Broadway,
New York 7, New York.

EDWARD V. ALFIERI,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 631

EMRAY REALTY CORP.,

Petitioner-Appellant,

v.

ROBERT C. WEAVER, as State Rent Administrator,

Respondent-Appellee,

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee, the New York State Rent Administrator, moves, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, to dismiss or affirm on the grounds that (a) this appeal does not present any substantial constitutional question; (b) the judgment appealed from was based on an adequate non-federal basis and (c) the questions presented are so insubstantial as not to warrant argument.

Statement

This proceeding comes before the Court by virtue of a Notice of Appeal filed from a judgment of the Court of Appeals made on May 16, 1957 in *Emray Realty Corp.* v.

Weaver, 3 N. Y. 2d 771. There the Court, in denying appellant's motion for leave to argue the non-existent appeal, held:

> "A motion having heretofore been made herein upon the part of the appellant for leave to argue the above appeal or, in the alternative, to amend the remittitur and papers having been submitted thereon and due deliberation having been thereupon had, it is
>
> ORDERED, that the said motion be and the same hereby is dismissed upon the ground that no appeal is pending in this Court."

Obviously, such a ruling was not founded on any constitutional question—there simply was no appeal pending before the Court. Thus, this appeal should be summarily dismissed.

Contrary to the statements made by appellant (p. 1, App. Brief), the ruling of the Court of Appeals, dated April 4, 1957 (*Emray Realty Corp.* v. *Weaver*, 2 N. Y. 2d 973) has not been noticed for appeal to this Court. Time to file such notice has long since expired and any attempt to obtain review of that ruling is contrary to the rules of this Court and, therefore, should be rejected as jurisdictionally defective (28 U.S.C. 2101; *Department of Banking* v. *Pink*, 317 U. S. 264, 266-7).

The Administrator is therefore of the belief that the appeal should be dismissed for want of jurisdiction. Nevertheless, in the interest of a complete presentation of the case, this brief will be devoted to a showing that, even if an appeal properly lay from the April 4, 1957 ruling, the latter should be affirmed, or the appeal dismissed, on the merits.

In cases such as this, where a landlord applies to the Rent Commission for permission to withdraw from the rental market, the Administrator is charged, under the

State Rent Act, with the burden of determining whether the landlord in good faith seeks to withdraw his properties without any intent to rent or sell. This task is part of the Administrator's overall responsibility of guarding against exploitation of the housing shortage by unscrupulous persons. The cases are legion in which the State Rent Administrator has authorized withdrawal by sincere landlords.

The record in this case contained no credible evidence upon which a finding of good faith could be made. It constituted nothing more than statements by the attorney that landlord intended to withdraw the building from the rental market. No serious effort was made by the landlord to establish its good faith by valid objective criteria as required in Section 59 of the Commission's Regulations (*Asco Equities* v. *McGoldrick*, 258 App. Div. 381, aff'd 309 N. Y. 738). The Commission, therefore, denied the request to withdraw this building from the rental market at this time. Thus, this is simply a case in which this landlord has failed where others have succeeded.

It is our position that the Court of Appeals, in its judgment dated April 4, 1957, properly held that no substantial constitutional question was directly and necessarily involved. The matter throughout has turned on the independent State ground that there was substantial proof in the record to warrant the Administrator's finding of fact in this wholly administrative proceeding (*Grayson* v. *Harris*, 267 U. S. 352, 358; *Portland R. Co.* v. *Railway Comm.*, 229 U. S. 397, 411).

Appellant-landlord's attempt to obtain review by this Court is based on frivolous grounds and irresponsible conclusory statements. The temper of the appeal is exemplified by the wholly irresponsible charges levelled against the Supreme Court, the Appellate Division and the Court of Appeals of the State of New York. Appellant (p. 7, App. Br.), referring to the decisions ren-

dered by the Courts in this case, states:

> "Back of such refusal is the tremendous adverse publicity received by appellant and its attorney."

Out of the same cloth appellant has fabricated the scandalous charge, made for the first time in this proceeding, that its witnesses did not appear because they were threatened and intimidated by the Rent Commission of the State of New York.

In addition, the appellant has injected numerous references to criminal convictions, Bar Association and Internal Revenue investigations of its attorney of record, Arnold Schildhaus. These never were part of the proceedings before the State Rent Administrator. Nor was the State Rent Administrator party to or involved in such matters. These are the personal problems of the appellant's attorney with the various agencies and law departments of the City of New York. They have no place whatsoever in this appeal or in the record.

Thus the factual picture in this record is substantially different from that which appellant has attempted to paint in its brief. Accordingly, the Commission deems it desirable to state the facts.

The Facts:

This proceeding concerns a Harlem tenement located in the City of New York. It is subject to the provisions of the New York State Emergency Housing Rent Control Laws and Regulations.

On January 14, 1955 the State Rent Administrator, upon a remission ordered by the Appellate Division, First Dept. (*Emray* v. *McGoldrick*, 284 A. D. 880), had, after investigation and formal hearing, reaffirmed its determination that it was the obligation of the landlord to provide interior and exterior repairs to the building. Con-

sequently, the Administrator reduced rents throughout the building, because of the failure of landlord to provide those services.

The landlord sought judicial review (Article 78 C.P.A.) at Special Term of the Supreme Court. The Commission's ruling was upheld. Landlord again appealed to the Appellate Division, First Dept. Having previously remitted the matter, the Court now denied the appeal by a unanimous bench, ruling that the record fully supported the Administrator's findings on all issues. (*Emray* v. *Abrams*, 285 A. D. 1146.)

Landlord then appealed directly to the Court of Appeals, urging that there was a constitutional question directly involved (*Emray* v. *Abrams*, 309 N. Y. 888). There, for the first time in these proceedings, landlord raised the question of withdrawing the building from the rental market. Heretofore, the only issues before the Courts and the Commission were the obligation to make repairs and the reduction of rents. The question of withdrawal was not in issue. At that time, there had been in the record no application, no facts and no supporting papers filed by the landlord for certificates authorizing the withdrawal of the building from the rental market.

Acting on the landlord's direct appeal, the Court of Appeals in November, 1955 (*Emray* v. *Abrams*, 309 N. Y. 888), remitted the entire proceeding to the State Rent Commission, extending to the landlord an opportunity at a full hearing to establish a case for withdrawal from the rental market. (Appellant's statement that in *Emray* v. *McGoldrick*, 307 N. Y. 772, the Court of Appeals rendered an opinion in this case, is misleading. That ruling long preceded this matter, having been decided in July, 1954—over 3½ years ago—and no appeal was taken to this Court.)

Thus, the mandate of the Court of Appeals was that the Administrator reprocess this case and, in addition, apply

the objective standards of Section 59 of the Rent and Eviction Regulations, which the Court had already declared to be both valid and constitutional (*Asco Equities* v. *McGoldrick*, 309 N. Y. 738). In other words, the case was reduced to the simplest type, in which the State Rent Administrator, in the proper exercise of his authority, was to make a finding on the facts and the evidence in the record before him. The Commission did precisely that and made no departure whatever from the mandate of the Court of Appeals.

1. Proceedings Before the Commission Following Remission by the Court of Appeals

A hearing was conducted on January 30 and 31, 1956 at the Principal Office of the Commission at which stenographic minutes were taken. Landlord submitted no credible evidence as to the cost of correcting the violations on the building. There was no statement in any form by a builder, contractor, or even by any member of the landlord corporation. The principals of the corporation were said to be a Mr. Cohen who lives in California, and a Mr. Brand who lives in Texas. But they never submitted any affidavits, and never appeared in this or any other proceeding. Bills and checks were in complete conflict. Some checks never cleared any bank. Only one check bore the name of the appellant as payee. All others were in the name of another corporation. Mr. Schildhaus, attorney for landlord, made all the affidavits with no supporting credible data. He alone testified under oath for a day and a half "as assistant vice-president, strictly for the purpose of litigation and to wind this thing up."

At the conclusion of the hearing, the Commission sought to obtain an audit of the books and records of the corporation. However, the attorney for the landlord, after testifying that they were in his possession and would be available for audit, refused to submit them.

The Commission reviewed all the evidence submitted and found it to be in hopeless conflict. There was nothing which would support the allegation of the landlord that it intended in good faith to remove the building from the rental market.

On this record, the State Rent Administrator on May 23, 1956, ruled in a 17-page opinion that the landlord had failed to establish, as required by law, that it intended in good faith to permanently withdraw the building from the rental market without any intent to rent or sell.

Further the Commission re-affirmed its previous order, holding that it was this landlord's obligation under the Rent Law to furnish to its tenants those services included in the maximum rents. In this regard it is to be noted that landlord's attorney testified that landlord availed itself of the benefits of the Rent Law, during the pendency of the proceedings and obtained increases in rents based on restoration of some services.

2. Judicial Rulings on the Commission's Order

The landlord then commenced the involved proceedings to set aside the Commission's ruling, before the Supreme Court, the Appellate Division and the Court of Appeals, which led to the instant appeal. Every court unanimously upheld the Rent Administrator. In each instance the decision of the Court was predicated on the non-constitutional issue of whether, on the record before him, the State Rent Administrator was arbitrary or capricious. This is quickly apparent from the following sequence of judicial determinations.

July 7, 1956

Special Term of the Supreme Court (Lupiano, J.) dismissed landlord's petition, brought under Section 1283, *et seq.*, of the Civil Practice Act, to review the State Rent Administrator's order and opinion of May 23, 1956.

The Court found there was sufficient warrant in the record both in fact and in law. (*Emray* v. *Weaver,* N.Y.L.J., July 7, 1956, Sup. Ct., N. Y. Co.,—not otherwise reported.)

October 18, 1956

The Court of Appeals granted the Rent Administrator's motion to dismiss landlord's direct appeal, brought under Section 588, Subd. 4, of the Civil Practice Act. The seven Judges of the Court found that there were questions involved other than the validity of a statutory provision of the State or Federal Constitutions. (*Emray* v. *Weaver,* 2 N. Y. (2d) 748.)

February 6, 1957

Landlord, exercising its statutory right, then appealed the ruling of Special Term (Lupiano, J.) to the Appellate Division. The five Judges of that Court, after hearing extensive argument, and after a searching interrogation of landlord's attorney, unanimously upheld the ruling of the State Rent Administrator. (*Emray* v. *Weaver,* 3 A. D. (2d) 697, 1st case.)

April 4, 1957

The Court of Appeals, acting on the Commission's motion to dismiss landlord's second direct appeal—this time under Subd. 1, of Section 588 of the Civil Practice Act and from the Appellate Division ruling—held that no substantial constitutional question was present. This decision was dispositive of the case. (*Emray* v. *Weaver,* 2 N. Y. (2d) 973.)

May 16, 1957

The Court of Appeals dismissed a subsequent motion brought by landlord to argue the appeal or amend the remittitur. The stated ground for dismissing was that

no appeal was pending in the Court. (*Emray* v. *Weaver*, 3 N. Y. (2d) 771.)

This is the ruling which landlord has noticed for appeal to this Court—no other.

Argument

1. The Historical Background

The legislation which is challenged here did not come into being by sheer chance. Rather, it was the result of the culmination of public hearings and intensive study every two years by the Legislative Committee, which has kept its finger on the rent control pulse since 1948. (See the Report of the Temporary Commission created to Study Rents and Rental Conditions, dated March 20, 1957, McKinney's 1957 Session Laws of New York, pp. 1535 *et seq.*)

The Court is asked to take judicial notice of Governor Harriman's special message to the Legislature on January 23, 1957, recommending continued rent control (McKinney's 1957 Session Laws of New York, pp. 1733 *et seq.*) because: "Regrettably, the day when rent controls can be eliminated throughout New York State has not yet arrived": and because "Continued shortage of housing accommodations has made it imperative that all possible steps to improve existing residential buildings be taken." Immutable evidence in support of this legislation is found in that part of the message subtitled "The Existing Housing Shortage." There, the Court will find full verification of the above statements, together with supporting facts and statistics compiled by the United States Bureau of the Census.

Clear recognition of the continued housing shortage of emergency proportions in New York State is mirrored in the Majority and Minority Reports of the Temporary Commission to Study Rents and Rental Conditions (Legis-

lative Document (1957) No. 22), which were prepared after a public hearing, and were transmitted to the Legislature on March 20, 1957. Attention of the Court is particularly directed to that portion of the Majority Report subtitled "Emergency" (p. 20) where, after a lengthy review of the Act's historical background, the judicial approval of its constitutionality, and the statements and testimony obtained at the public hearings, it stated:

> "It is abundantly clear, the Commission finds, that the emergency which made it imperative for the Legislature to invoke the police power on behalf of the tenants as a stop-gap in 1946 and as necessity since 1950, continues to exist unevenly in those areas of the state subject to rent and eviction controls."

The minority report concurred and recommended tighter control. Thus, this acute housing shortage which gave rise to emergency legislation is a matter of public knowledge.

2. No Substantial Constitutional Issue Is Presented

The principles by which to test the constitutionality of a statute resting on the police power have been asserted over and over again. A legislative enactment carries with it a strong presumption of constitutionality, i.e., it is presumed to be supported by facts known to the legislature. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152; *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 509-510; *East New York Saving Bank* v. *Hahn*, 293 N. Y. 622, 627-28, affirmed 326 U. S. 230. The Courts may not be concerned with questions as to the reasonableness, wisdom, propriety, or desirability of such a statute; nor may they substitute their judgment for that of the legislature so long as there can be discovered "any state of facts either known or which could reasonably be assumed" to afford support for the legislative decision to

act. *United States* v. *Carolene Products Co., supra,* 304 U. S. 144, 154; *East New York Saving Bank* v. *Hahn, supra,* 326 U. S. 230, 234; *South Carolina Highway Dept.* v. *Barnwell, supra,* 303 U. S. 177, 191; *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251, 263.

In *East New York Saving Bank* v. *Hahn, supra,* the constitutionality of the mortgage moratorium statute, originally enacted in 1933, and extended to July, 1944 by Ch. 93, L. 1943, was challenged. Plaintiff urged that "the serious depression and emergency • • • no longer existed at the time of the enactment of Ch. 93 of L. 1943, had not existed for several years and does not now exist." This Court in affirming wrote (p. 234):

> "Appellant asks us to reject the judgment of the joint legislative committee, of the Governor, and of the legislature, that the public welfare, in the circumstances of New York conditions, requires the suspension of mortgage foreclosures for another year. On the basis of expert opinion, documentary evidence, and economic arguments of which we are to take judicial notice, it urges such a change in economic and financial affairs in New York as to deprive of all justification the determination of New York's legislature of what New York's welfare requires. We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war savings bonds; increased payrolls and store sales; available mortgage money and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements, namely the effect of the war and of its termination, and similar matters. Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary. • • •"

The statutory protection of tenants in the continued possession of their homes during such shortage as an appropriate and effective means of counteracting the evils attendant on the shortage has long since been upheld as constitutional (*People ex rel. Durham Realty Corp.* v. *LaFetra*, 230 N. Y. 429; *Block* v. *Hirsh*, 256 U. S. 135; *Marcus Brown Co.* v. *Feldman*, 265 U. S. 170; *Edgar A. Levy Leasing Co. Inc.* v. *Siegel*, 285 U. S. 242).

Rent control itself, as an exercise of the federal war power or state police power, has been upheld by this Court to be constitutional (*Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Marcus Brown Holding Co.* v. *Feldman, supra*). This particular New York State Act, as was adopted in 1950, was upheld by the highest Court of New York in an exhaustive opinion in *Teeval Co. Inc.* v. *Stern*, 301 N. Y. 346 (1950); certiorari was denied, 340 U. S. 876.

The present Emergency Housing Rent Control Law of the State of New York, Ch. 755 of the Laws of 1957, subd. 1044) like its predecessors, carefully guards the constitutional rights of property owners, specifically providing that no person will be required to offer any housing accommodations for rent. However, housing accommodations already on the rental market may be withdrawn only after written approval of the State Rent Commission, where withdrawal requires that a tenant be evicted from such accommodations (Section 59, Rent and Eviction Regulations). The law is well-established that while a landlord does have a constitutional right in the proper case to withdraw a building from the rental market, that right is not an unqualified one. The New York Court of Appeals so ruled in *Loab Estates* v. *Drube*, 300 N. Y. 176; *Asco Equities Inc.* v. *McGoldrick*, 285 App. Div. 381, aff'd 309 N. Y. 738; and again in *Emray Realty Corp.* v. *McGoldrick*, 307 N. Y. 772.

When the State of New York took over the administration of controls in 1950 (New York Emergency Housing

Rent Control Law, McKinney's Unconsolidated Laws, Section 8581 et seq.), all rents continued to be frozen at the 1943 federal rent level. In 1951, however, the State Law was amended to authorize the granting of rent increases where the State Rent Administrator found that a property was not yielding a specified "fair return" [id. at § 8584(1), subd. 4(a)(1)]. A provision of this type had been in effect under federal law for only one year, from 1949 to 1950. *Bowles* v. *Willingham*, 321 U. S. 503 (1944) and *Teeval Co. Inc.* v. *Stern*, 301 N. Y. 346 (1950) certiorari denied 340 U. S. 876, had, it should be emphasized, upheld the constitutionality of the Federal and State Rent Control Laws, respectively, without any such "fair return" provision at all. The return guaranteed by the Rent Act is 6% of the current assessed valuation.

Thus the Rent Act not only permits a landlord to withdraw from the rental market but insures a fair return to those who continue to rent their properties.

3. The Decisions Below Rested on Non-Federal Grounds

Finally, the decisions of all the Courts below rested wholly on the non-federal ground that there was warrant in the record for the Rent Administrator's finding of fact. This Court has consistently held that, before it will exercise its jurisdiction to review a decision of a State Court, it must affirmatively appear from the record not only (a) that a federal question was presented for decision to the highest Court of the state having jurisdiction, but (b) that its decision of the federal question was necessary to the determination of the cause, and (c) that said federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Eustis* v. *Bolles*, 150 U. S. 361, 366, 367; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Mellon* v. *O'Neil*, 275 U. S. 212, 214.

Even where the judgment of the State Court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. *Allen* v. *Arguimbau*, 198 U. S. 149, 154, 155; *Johnson* v. *Risk*, *supra*; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, *supra*; *Cuyahoga River Power* v. *Northern Realty*, 244 U. S. 300, 302, 304; *Hedgebeth* v. *North Carolina*, 334 U. S. 806; *Stembridge* v. *Georgia*, 343 U. S. 541, 547.

The appeal should be denied since landlord cannot establish a case within the framework of the sound criteria set forth in this Court's rulings.

We submit that the housing shortage of emergency proportions in New York, and the State's continuation of rent controls to meet that shortage, is an entirely local problem for decision by the New York State Legislature. Certainly, the particular judicial ruling challenged by the instant landlord involved a wholly state, and non-federal matter.

CONCLUSION

The order of the New York Court of Appeals is correct, and does not warrant further review by this court. Appellant presents no substantial federal question, and its appeal should be dismissed.

Dated: December 4, 1957.

Respectfully submitted,

NATHAN HELLER,
Attorney for Respondent-Appellee,
280 Broadway,
New York 7, New York.

EDWARD V. ALFIERI,
Of Counsel.

APPENDIX I

Statutes and Regulations Involved

Section 10(4) of Chapter 755 of the Laws of 1957 provides:

(4) Nothing in this act shall be construed to require any person to offer any housing accommodations for rent, but housing accommodations already on the rental market may be withdrawn only after prior written approval of the State Rent Commission, if such withdrawal requires that a tenant be evicted from such accommodations.

Section 59 of the Commission's Rent and Eviction Regulations provides:

Section 59. Withdrawal of Occupied Housing Accommodations From Rental Market. A certificate shall be issued where the landlord establishes that he seeks in good faith to permanently withdraw occupied housing accommodations from both the housing and non-housing rental markets without any intent to rent or sell all or any part of the land or structure and (1) that he requires the entire structure containing the housing accommodations or the land for his own immediate use in connection with a business which the landlord owns and operates in the immediate vicinity of the property in question, or (2) that substantial violations affecting the health and safety of the tenants have been placed on the structure containing the housing accommodations by the local authorities having jurisdiction over such matters and that the cost of removing these violations would substantially equal or exceed the assessed valuation of the structure, or (3) where the landlord is a hospital, convent, asylum, public institution, college, school or any institution operated exclusively for charitable or educational purposes on a non-profit basis and requires the housing accommodations or the land for its own immediate use in connection with its charitable or educational purposes, or (4) that the continued operation of the housing accommodations would impose other undue hardship upon him. No certificate shall be issued under this section where the granting of a certificate is inconsistent with the purposes of the Act.